SUPREME COURT, U. S.
LIBRARY

Office-Supreme Court, U.S.
FILED
DEC 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1964.

No. 745

IN THE MATTER OF THE APPLICATION
OF
ALFRED BISHOP,
Petitioner,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, the Honorable DANIEL J. McAVOY, as Justice of said Court, and RICHARD B. THALER, Esq., as District Attorney of the County of Tompkins, pursuant to Article 78 of the Civil Practice Act,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

FRANK E. VISCO,
Attorney for Petitioner,
15 Tompkins Street,
Cortland, N. Y.

THE RECORDER COMPANY, INC., Walton, N. Y.—UN 5-4121—1964

Index.

	Page
Petition	1
Citations to Opinions Below	2
Determination in Court Below	3
Basis of Jurisdiction	3
Question for Review	4
Statement of Case	8
Reasons for Granting Writ	14
Argument: A re-trial of petitioner by the State of New York upon the charge of felony carnal abuse, of which he was acquitted by the trial court, would violate his rights, immunities and privileges guaranteed to him against the State by the due process clause of the fourteenth Amendment to the United States Constitution	15
Conclusion	31
Certificate	31

APPENDIX

Opinion of Court Below	1a
Order Denying Re-argument and Granting Amendment of Remittitur	2a
Amended Remittitur	4a
Provisions of New York State Constitution	7a

DECISIONS CITED.

Page

Brock v. North Carolina, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 ..... 20, 23, 24

Cornero v. United States, 48 Fed. 2d 69 27

Downum v. United States, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 ..... 20, 26

Dunn v. United States, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356 19

Escobedo v. Illinois, 378 U. S. 478, S. Ct. , L. Ed. 2d 28

Evergreens v. Nuna, 141 Fed. 2d 927, 47 B. T. A. 815 13

Ex parte Lange, 85 U. S. (18 Wall.) 163 26

Ex parte Peru, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014 18

Ex parte Simons, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094 18

Ex parte Ulrich, 42 Fed. 587, rev'd o. g. 43 Fed. 661 ..... 23, 28, 29

Fong Foo v. United States, 369 U. S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 17

Forman v. United States, 264 Fed. 2d 955, aff'd 361 U. S. 416, 80 S. Ct. 481, 4 L. Ed. 2d 412 28

Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 12 L. Ed. 2d 250 ..... 23, 28, 31

Page

Green v. United States, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 ..... 19, 24, 26

Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270 24

Hoag v. New Jersey, 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed 2d 913 13

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 22

Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 29

In *re* Bennett, 84 Fed. 324 29

Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 134 N. E. 2d 97 13

Jackson v. Denno, 378 U. S. 368, S. Ct. , L. Ed. 2d 22, 28

Johnson v. People, 55 N. Y. 512 15

Keerl v. Montana, 213 U. S. 135, 29 S. Ct. 469, 53 L. Ed. 734 23

Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114 ..... 20, 23, 24

Louisiana *ex rel.* Francis v. Resweber, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422 28

Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 24

Page

Malinski v. New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029 24

Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 28

Matter of McCabe v. Bronx County Court, 24 Misc. 2d 477, 199 N. Y/S. 2d 247 16

Matter of Nolan v. General Sessions, 11 N. Y. 2d 114, 181 N. E. 2d 751 ..... 17, 18, 23, 24

Matter of Allen v. City of Ithaca, 33 Misc. 2d 356, 224 N. Y. S. 2d 1018 20

Matter of Bishop v. Supreme Court, etc., 38 Misc. 2d 106, 238 N. Y. S. 2d 107, 19 A. D. 2d 296, 241 N. Y. S. 2d 957, 14 N. Y. 2d 321, N. E. 2d 2, 30

Matter of Kraemer v. Suffolk County Court, 6 N. Y. 2d 363, 160 N. E. 2d 633 ..... 18, 20, 21, 28, 29

Matter of Mack v. General Sessions, 14 A. D. 2d 98, 217 N. Y. S. 2d 423 18

Moore v. Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306 ..... 23, 28, 29

Oliver v. Superior Court for Los Angeles County, 92 Cal. A. 94, 267 Pac. 764 18

Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 ..... 29, 30

People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111 15

People v. Bennett, 49 N. Y. 137 19

Page

People v. Bishop, 38 Misc. 2d 106, 238 N. Y. S. 2d 107 ..... 2, 30

People v. Bishop, 14 A. D. 2d 376, 221 N. Y. S. 2d 390, 11 N. Y. 2d 854, 182 N. E. 2d 284 ..... 9, 10

People *ex rel.* Blue v. Kearney, 181 Misc. 981, 44 N. Y. S. 2d 691, aff'd 292 N. Y. 679 21

People *ex rel.* Brinkman v. Barr, 129 Misc. 701, 222 N. Y. S. 490 29

People *ex rel.* Cohen v. Collins, 238 App. Div. 592, 265 N. Y. S. 475 24

People v. Colon, 18 Misc. 2d 1061, 184 N. Y. S. 2d 537 17

People v. Church, 7 A. D. 2d 817 (43), 180 N. Y. S. 2d 949 15

People v. DeSantis, 305 N. Y. 44, 110 N. E. 2d 549 .. 16

People v. Dillon, 197 N. Y. 254, 90 N. E. 820 17

People v. Dowling, 84 N. Y. 478 19

People v. Gehlberd, 272 A. D. 914, 70 N. Y. S. 2d 819 18

People v. Goldfarb, 152 App. Div. 870, 138 N. Y. S. 62, aff'd 213 N. Y. 664 ..... 18, 20, 24, 28

People v. Hines, 12 N. Y. S. 2d 454 29

People v. Johnson, 8 N. Y. 2d 183, 168 N. E. 2d 641 ..... 15, 16

People v. Kassover, 205 N. Y. S. 2d 428 20

People v. Laws, 29 Ill. 2d 221, 193 N. E. 2d 806 ..... 23, 29

People v. Ledwon, 153 N. Y. 10, 46 N. E. 1046 19

People v. Litt Chinitz, 38 Misc. 2d 864, 239 N. Y. S. 2d 58 13

Page

People v. Marra, 13 N. Y. 2d 18, 191 N. E. 2d 792 20

People v. McGuire, 5 N. Y. 2d 523, 158 N. E. 2d 830 16

People *ex rel.* Meyer v. Warden, 269 N. Y. 426, 199 N. E. 647 ..... 17, 18

People v. Pritchard, 28 Misc. 2d 907, 218 N. Y. S. 2d 883 16

People *ex rel.* Pulko v. Murphy, 244 App. Div. 382, 280 N. Y. S. 405 29

People v. Reed, 276 N. Y. 5, 11 N. E. 2d 330 ..... 20, 26

People v. Rosen, 208 N. Y. 169, 101 N. E. 855 15

People v. Sciascio, 268 App. Div. 14, 48 N. Y. S. 2d 428, aff'd 294 N. Y. 927 19

People v. Sickles, 156 N. Y. 541, 51 N. E. 288 15

People *ex rel.* Stabile v. Warden, 67 Misc. 202, 122 N. Y. S. 284, 202 N. Y. 138, 95 N. E. 729 ..... 18, 21, 23, 25, 26, 29

People v. Thrum, 143 Misc. 7, 256 N. Y. S. 586 ..... 20, 24

People *ex rel.* Totalis v. Craver, 174 Misc. 324, 20 N. Y. S. 2d 533 29

Rogers v. Richmond, 365 U. S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 28

Sapir v. United States, 348 U. S. 373, 75 S. Ct. 422, 99 L. Ed. 426 27

Shoener v. Pennsylvania, 207 U. S. 188, 28 S. Ct. 110, 52 L. Ed. 163 ..... 29, 30

Page

State *ex rel.* Harger v. Chapman, 131 Wash. 581, 230 Pac. 833 18

Sullivan v. People, 27 Hun 35 19

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 114, 53 L. Ed. 97 ..... 25, 30

United States *ex rel.* Marcus v. Hess, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443 ..... 25, 30

United States v. Oppenheimer, 242 U. S. 85, 37 S. Ct. 68, 61 L. Ed. 161 13

United States *ex rel.* Rush v. Watson, 28 Fed. Cas. 499, Case No. 16,651 27

CONSTITUTIONAL PROVISIONS CITED.

U. S. Constitution,

5th Amendment 4, 13, 22

14th Amendment, Sec. 1 ..... 4, 13, 14, 21, 22, 23

McKinney's, N. Y. State Constitution,

Art. I, Sec. 6 ..... 4, 13, 14, 15, 21, 22, 24

STATUTES CITED.

	Page
U. S. Code, Title 28, Sec. 1257 (3)	3
McKinney's, N. Y. Code of Criminal Procedure,	
Secs. 9	6, 22
275-b.	5, 15
340	7
341	7, 19
428 (2)	21
430	6, 21
518 (3)	7, 13, 21, 29
543	19
544	19
McKinney's N. Y. Penal Law,	
Secs. 32	6, 13, 21
483-b.	5, 8
1938	6, 21, 22

MISCELLANEOUS.

U. S. Supreme Court Rule 19	3
1959 McKinney's, Session Laws of N. Y., pp. 1625-1630	15, 16

IN THE

Supreme Court of the United States

OCTOBER 1964 TERM

No. .....

IN THE MATTER OF THE APPLICATION

of

ALFRED BISHOP,

Petitioner,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, THE HONORABLE DANIEL J. MCAVOY, as Justice of said Court, and RICHARD B. THALER, Esq., as District Attorney of the County of Tompkins, pursuant to Article 78 of the Civil Practice Act,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States,

The Petitioner, Alfred Bishop, respectfully shows the following:

Citations to Opinions Below.

The basic criminal action involved was successfully moved by the prosecution in the Supreme Court of the State of New York for Broome County on March 6, 1963, for a third trial, following two jury disagreements, upon a charge against petitioner of felony carnal abuse, after the original trial court upon the first trial had dismissed that charge at the close of the State's case on the ground that a prior conviction, a necessary element of the felony charged and necessarily alleged in the indictment, was not proved. The petitioner, a citizen of the United States, objected at the outset to such re-trial on constitutional grounds (record below, pp. 45-53). The opinion of that court, disallowing petitioner's objection (record below, p. 61), is reported at 38 Misc. 2d 106, 238 N. Y. S. 2d 107.*

Thereupon, petitioner, again urging his constitutional protection against double jeopardy (record below, p. 20), instituted an original proceeding in the nature of prohibition against the State court, etc., in the Appellate Division of the Supreme Court of the State of New York, Third Department, to restrain such re-trial. Its order was rendered on July 30, 1963. The opinion of that court, favorable to petitioner, is reported at 19 A. D. 2d 296, 241 N. Y. S. 2d 957.*

Thereafter the State of New York appealed to its Court of Appeals, and that Court on July 10, 1964, reversed in opinion reported at 14 N. Y. 2d 321, ... N. E. 2d .....

On application timely made by petitioner on August 6, 1964, returnable on September 28, 1964, the earliest possible date, the Court below, by its order dated and entered October 1, 1964, denied his motion for reargument but

* These opinions are set out in the record on appeal to the Court below at pp. 54-59, and 6-10. Nine additional copies of that record have been filed with this Court.

granted his motion to amend its remittitur to show that petitioner raised constitutional questions on the appeal in that Court, by adding thereto the following:

> "The petitioner contended that the order directing his retrial upon the charge of carnal abuse as a felony would deny him due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. The Court of Appeals, passing upon such contention, held that there was no violation of the petitioner's constitutional rights."

The decision amending the remittitur is reported at 14 N. Y. 2d 959, ... N. E. 2d .....

The Determination in the Court Below.

The final order of the highest State Court herein, entered on October 1, 1964, would permit the prosecution to obtain a superseding indictment* reviving against petitioner the charge of felony carnal abuse, and subject him again to trial thereon, after he was duly acquitted thereof by the trial court at his first trial.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under its Rule 19 and under Title 28, Section 1257, subd. (3), of the United States Code, upon the ground that petitioner's rights, privileges and immunities against double jeopardy and vexatious re-trial, and his right to due process of law and to the equal protection of the laws, have not been afforded him by the State of New York as required by the Fourteenth Amendment to the Constitution of the United States.

---

* The indictment as originally returned is set forth in the record on appeal to the Court below at pp. 22-26.

The constitutional issue presented revolves around Count 1 of the indictment and its dismissal as a felony by the trial court *without error* for insufficiency of evidence adduced by the prosecution at the trial, resulting in an acquittal of petitioner thereunder.

The Question Presented for Review.

Would the State of New York, in the manner of the application by the Court below of its constitutional law, statutes and judicial decisions, and by its decision below, violate or threaten to violate the rights of petitioner guaranteed to him by the Fourteenth Amendment to the *Constitution of the United States,* in subjecting him again to indictment and trial under the charge of felony carnal abuse which was originally dismissed *without error* by the trial court for insufficiency of evidence adduced at the first trial?

Constitutional Provisions.

United States Constitution, Fourteenth Amendment:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

United States Constitution, Fifth Amendment:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *"

McKinney's, New York State Constitution, Article I, Section 6:

"* * * No person shall be subject to be twice put in jeopardy for the same offense; * * *.

"No person shall be deprived of life, liberty or property without due process of law."

Statutory Provisions.

McKinney's Consolidated Laws of New York, Penal Law:

"Section 483-b. CARNAL ABUSE OF A CHILD OF OVER TEN YEARS OF AGE AND LESS THAN SIXTEEN:

"Any person who carnally abuses the body of a child of over the age of ten years and less than sixteen years of age, or who indulges in any indecent or immoral practice with the sexual parts or organs of any such child, in a manner other than by an act of sexual intercourse, shall be guilty of a misdemeanor, punishable by fine of not more than five hundred dollars or imprisonment for not more than one year, and shall be guilty of a felony, punishable with imprisonment for not more than ten years or with imprisonment for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be the duration of his natural life, where such person has been previously convicted either within or without the state of a similar crime or of the crime of rape in the first degree, rape in the second degree, abduction, sodomy or incest or of the crime of endangering the morals of a child * * * or of the crime of carnal abuse of a child as defined in section four hundred eighty-three-a of the penal law * * *."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

"Section 275-b. INDICTMENT NOT TO CONTAIN RECORD OF PREVIOUS CONVICTIONS.

"The indictment shall not allege that the defendant has previously been convicted of any crime nor shall it set forth any record thereof, unless such prior conviction affects the degree of crime charged in the indictment."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

> "Section 9. SECOND PROSECUTION FOR THE SAME CRIME PROHIBITED.
>
> "No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted."

McKinney's Consolidated Laws of New York, Penal Law:

> "Section 32. ACQUITTAL OR CONVICTION BARS INDICTMENT FOR ANOTHER DEGREE.
>
> "Where a prisoner is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof."

McKinney's Consolidated Laws of New York, Penal Law:

> "Section 1938. PUNISHMENT WHEN DIFFERENT PENALTIES ARE PROVIDED BY DIFFERENT PROVISIONS OF LAW.
>
> "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

> "Section 430. WHEN JURY DISCHARGED OR PREVENTED FROM GIVING A VERDICT, CAUSE TO BE AGAIN TRIED.
>
> "In all cases where a jury are discharged, or prevented from giving a verdict, by reason of an

accident or other cause, except where the defendant is discharged from the indictment, during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

"Section 518. In What Cases Appeal May Be Taken by the People.

"* * * 3. From an order of the court, made at any stage of the action, setting aside or dismissing the indictment on a ground other than the insufficiency of the evidence adduced at the trial; * * *."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

"Section 340. What Is Deemed a Former Acquittal.

"If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment were dismissed upon an objection to its form or substance, without a judgment of acquittal, it is not deemed an acquittal of the same offense."

McKinney's Consolidated Laws of New York, Code of Criminal Procedure:

"Section 341. What Is Deemed a Former Acquittal.

"When, however, the defendant was acquitted on the merits, he is deemed acquitted of the same offense, notwithstanding a defect in form or substance, in the indictment on which he was acquitted."

Statement of the Case.

The petitioner raised the Federal questions involved herein imm iately when the State moved for a third trial under the charge of felony carnal abuse by his objection thereto (record below, pp. 45-53). The then trial court overruled the objection and ordered such trial (record below, p. 61). Again in the Appellate Division of the State Supreme Court, the petitioner raised the same questions on his application for an order of prohibition against the trial court (record below, p. 20). That court granted petitioner's application (record below, pp. 3-5). Those questions were ultimately presented to the Court below upon the State's successful appeal from the prohibition order (see amended remittitur annexed to record below).

On November 12, 1937, petitioner was convicted of carnal abuse as a felony in the Tioga County Court, State of New York. It is claimed that the complainant in the present case was carnally abused, etc., on October 21, 1960.

On December 8, 1960, the indictment* herein was returned against petitioner in the Supreme Court of the State of New York, for Tompkins County, and that Court duly transferred the indictment to the Tompkins County Court for disposition.

Count 1 of the indictment as originally returned charged the petitioner, under Section 483-b of the *Penal Law of the State of New York* with the crime of carnal abuse of a child over ten and under sixteen years of age. There was included in said co nt, to render the charge a felony, the necessary allegation of the prior conviction.

---

* Record below, pp. 22-26.

That count alleged that the petitioner:

> "• • • carnally abused the body and indulged in indecent and immoral practices with the sexual parts and organs of Stephanie Alles, a child of over ten years of age, and less than sixteen years of age, to wit: eleven years of age, in a manner other than by an act of sexual intercourse, in that he placed his hands upon and against the naked private parts of the child and did insert an object or instrument in her private parts causing physical injury and did place his face and body against her sexual parts and organs.
>
> "*The said defendant has been previously convicted in Tioga County, State of New York, of the crime of Carnal Abuse as defined in Section 483A of the Penal Law on the 21st day of November, 1937.*" (Italics ours.)

On December 15, 1960, subsequent to the return of the indictment, the 1937 conviction in the Tioga County Court was vacated by that court. The State appealed from the order of vacatur, but it did not perfect its appeal until after the second trial in this case.

Nor did the State ever make any application in either the Tioga or Tompkins County cases, nor in any court, for a stay of either of the trials in Tompkins County, pending the final disposition of the State's appeal in the Tioga County case.

In Tompkins County the first trial was held from March 6 through March 16, 1961. The second trial extended from June 19 to July 12, 1961. Both trials were had before the Hon. Norman G. Stagg, Tompkins County Judge.

A considerable time subsequent to the said trials, and specifically on November 22, 1961, the Appellate Division of the Supreme Court of the State of New York, Third Department, reversed the vacatur of the prior conviction. (*People v. Bishop*, 14 A. D. 2d 376, 221 N. Y. S.

2d 390.) The Court of Appeals of New York affirmed the reversal of said vacatur on April 5, 1962. (*People v. Bishop,* 11 N. Y. 2d 854, 182 N. E. 2d 284.)

When the indictment in question was first returned by the Tompkins County grand jury, it contained eight counts charging petitioner with carnal abuse as a felony (1); assault second degree (2) and (3); assault second degree with intent to commit the felony of carnal abuse (4); sodomy first degree (5), (6) and (7); and sodomy second degree (8).

Before any trial was had, petitioner on January 14, 1961, moved to inspect the grand jury minutes to base a further motion to dismiss each count of the indictment, among other things, on the ground that the prior conviction had been vacated by the Tioga County Court after the indictment in question was returned. The State opposed this motion.

This vacatur, however, had not occurred when this case was submitted, all on December 8, 1960, to the Tompkins County grand jury. The court itself inspected the grand jury minutes but on January 27, 1961, denied the motion to inspect, although presumably evidence of the prior conviction had been submitted to the grand jury.

Subsequently the third count of the indictment was dismissed entirely upon the merits before trial. Counts 4 and 8 of the indictment were dismissed entirely by the trial court on March 10, 1961, at the close of the State's case at the first trial, on motion of the petitioner based upon the insufficiency of the evidence adduced by the State at the trial. The trial court, also at that point in the first trial on March 10, 1961, dismissed all the allegations in Count 1 pertaining to that charge as felony carnal abuse for the reason that no proof of the prior conviction was adduced at the trial. In other words,

the trial judge, as required by law, dismissed the carnal abuse charge as a felony, Count 1, at the close of the State's case for such insufficiency.

Thereafter it submitted Count 1 as a misdemeanor to the jury. On March 16, 1961, the jury disagreed and was discharged.

The verbatim motion of petitioner, the colloquy of counsel with the court, and the rulings which resulted in the elimination of the charge of felony carnal abuse, follow:

> *"Mr. LoPinto: The defendant moves to dismiss count 1 of the said indictment as it now stands on the ground that on this record there is insufficient evidence or proof as a matter of law to establish the commission by the defendant of the crime charged in the said count, and on the ground that there is no evidence or proof in this record that this defendant was previously convicted of carnal abuse as alleged in the said count, and on the ground that there is a reasonable doubt as a matter of law in this record that the defendant committed any of the charges or allegations set forth in the said count.
>
> * * * * * *
>
> "The defendant further moves as to each and every count in the said indictment severally and respectively to dismiss the said counts on the ground that the People have failed to establish a prima facie case as to each of the said counts as a matter of law, and on the further ground that the People as to each and every one of the said counts have failed to establish a prima facie case as to any crime which could in law be included in the said indictment.
>
> * * * * * *
>
> "The Court: The second paragraph of count 1 of the indictment must be stricken by reason of the

* Trial minutes, first trial, Vol. III, pp. 499-506; and record below, pp. 48-49.

proceedings in the Tioga County Court, but there remains, it seems to me, the charge of carnal abuse properly alleged, but I will grant your motion as to the first count insofar as the second paragraph of that count is concerned. That will be stricken. Your motion is denied as to the remainder of count 1.

"Mr. LoPinto: In order to clarify the record, does your Honor include in that ruling that your Honor, therefore, upon such ruling just made, intends to submit the rest of count 1 as a misdemeanor?

"The Court: Whatever the statute provides. The second paragraph, as I recall, increases, the degree of the crime by reason of the alleged previous conviction.

"Mr. LoPinto: From what to what degree? I think we agree as the count now stands that it merely charges, assuming it is proper to go to the jury, a misdemeanor, is that correct, Mr. Sovocool?

"Mr. Sovocool: Yes.

"The Court: I think that is correct. I did intend to submit the first count of the indictment with the second paragraph of that count being stricken from the indictment by reason of the action of the Tioga County Court.

"Mr. LoPinto: If I understand it, your Honor, you are granting my motion to dismiss that count as a felony, but your Honor intends to submit it to the jury as a misdemeanor, is that correct?

"The Court: That is correct."

Thus, the first count then continued as a misdemeanor charge, as was by that time the law of the case. And, when the second trial commenced on June 19, 1961, the People moved it as a misdemeanor. Again the jury disagreed, on July 12, 1961.

Counts 2, 5, 6 and 7 were submitted to the jury at both trials, and they remain as they were originally set forth in the indictment.

This case does not involve simply a disagreement of the jury as to a criminal charge actually submitted to it. It involves rather a dismissal by the trial court of a felony charge first, and then a jury disagreement on a lesser included crime.

The dismiss. of Count 1 as a felony was not a dismissal on a ground *other than the insufficiency of the evidence adduced at the trial.* Therefore, the dismissal was on the merits, and the petitioner is protected from its resurrection by superseding indictment or in any manner by the laws prohibiting double jeopardy. (N. Y. Penal Law, Sec. 32; N. Y. Code of Criminal Procedure, Sec. 518, subd. 3.)

Furthermore, the State is estopped from relitigating the issue whether the respondent committed carnal abuse as a felony, after having previously litigated it to a dismissal for such *insufficiency of the evidence adduced at the trial* in failing to prove the prior conviction alleged in the indictment. (N. Y. Constitution, Art. I, Sec. 6; U. S. Constitution, 5th and 14th Amendments; *Hoag v. New Jersey*, 356 U. S. 464, 475, 78 S. Ct. 829, 2 L. Ed. 2d 913; *United States v. Oppenheimer*, 242 U. S. 85, 37 S. Ct. 68, 61 L. Ed. 161; *Israel v. Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97; *People v. Litt Chinitz*, 38 Misc. 2d 864, 239 N. Y. S. 2d 58.)

The question of fact as to whether there was a prior conviction was litigated at petitioner's first trial, and it was not proved. So, the fact of its negation at that time, having been decided, was conclusively established between the parties. (*Evergreens v. Nuna*, 141 Fed. 2d 927, 928, 47 B. T. A. 815.)

Reasons for Granting Writ.

The court below has deviated from the traditional double-jeopardy protection guaranteed by organic law, to compel re-trial upon a criminal charge previously dismissed *without legal error* for failure of proof at the trial by adding a startling new element of probability of conviction at the commencement of trial in order to make available to the accused the bar against double jeopardy and vexatious successive prosecution.

Such a novel rule, essentially unfair, would mean that, sometime after the judicial dismissal *without error* of a charge on the evidence after trial commenced, the State with hindsight can re-examine the facts, and, if some essential fact which could have been proved before, but was not, can be subsequently proved, the State may claim non-merits disposition and may start all over again, thus securing another chance at convicting the accused.

Thus, the court below has decided a Federal question of due process of law not heretofore determined by this court, and it has decided it not in accordance with the decisions of this court or of the court below, and contrary to the *Constitutions* of New York, Article I, Sec. 6, and of the United States, Fourteenth Amendment.

The writ prayed herein should be granted so that the said decision below may be reviewed to the end that its far-reaching limitation upon personal liberty by a state may be reversed.

If the decision below is permitted to stand, every criminal prosecution tried to finality *without error* will be subject to subsequent factual re-examination on the part of a state to determine whether it can furnish additional essential proof and, thus, endeavor to obtain a conviction upon re-trial. The traditional concept of

permitting only once the litigation *without error* of a necessary fact to finality upon the merits would be exploded by the decision below.

Argument.

In New York, an accused may be tried for a felony only upon a legally valid indictment. (N. Y. Constitution, Art. I, Sec. 6; *People ex rel. Battista v. Christian,* 249 N. Y. 314, 164 N. E. 111.)

When the indictment was returned on December 8, 1960, it was mandatory for the State to allege and prove upon the trial the prior conviction under Count 1 in order to charge and establish the crime of carnal abuse as a felony, and such prior conviction was a substantive element of that crime. (N. Y. Code of Criminal Procedure, Sec. 275-b [eff. Sept. 1, 1959]; *People v. Johnson,* 8 N. Y. 2d 183, 186, 168 N. E. 2d 641; *People v. Church,* 7 A. D. 2d 817 [43], 180 N. Y. S. 2d 949.)

And, in order to convict of the higher degree of crime, the State had to prove such prior conviction by sufficient evidence *adduced at the trial* as part of its *prima facie* case, prior to the addition of former Section 275-b in 1957. (*Johnson v. People,* 55 N. Y. 512, 514; *People v. Sickles,* 156 N. Y. 541, 51 N. E. 288; *People v. Rosen,* 208 N. Y. 169, 101 N. E. 855.) See: 1959, McKinney's Session Laws of New York, pages 1625-1630 (Study of New York Law Revision Commission on 1959 amendment).

Neither the 1957 addition of Section 275-b to the *Code* nor the 1959 amendment changed this rule in respect to the case at bar.

In short, at the time of the first trial in this case, the allegation of the 1937 conviction for carnal abuse, which was contained in Count 1 of the indictment, was an element of the felony carnal abuse charged, and in New York

was, therefore, a necessary and substantive element of the charge because it "affects the degree of crime charged" and "is an element of such crime." That such a prior conviction alleged in the indictment affects the *degree* is made clear in the following cases (*People v. Johnson*, 8 N. Y. 2d 183, 168 N. E. 2d 641; *People v. DeSantis*, 305 N. Y. 44, 110 N. E. 2d 549; *People v. McGuire*, 5 N. Y. 2d 523, 158 N. E. 2d 830; *People v. Pritchard*, 28 Misc. 2d 907, 218 N. Y. S. 2d 883).

Inasmuch as it was mandatory at the time the indictment herein was returned on December 8, 1960, to include an allegation in Count 1 of the prior conviction, in order to make that count charge carnal abuse as a felony, when the petitioner was put to trial by the People he was placed legally in jeopardy as to Count 1 as a felony, just as soon as the trial got under way.

The Supreme Court having denied petitioner's motion before trial, opposed by the State, to inspect the grand jury minutes as a preliminary to a motion by him thereon in the Tompkins County Court to dismiss Count 1 of the indictment, the petitioner could not move before trial to dismiss that count, because it was valid on its face. (*Matter of McCabe v. Bronx County Court*, 24 Misc. 2d 477, 199 N. Y. S. 2d 247.)

The State was required to make such proof of the prior conviction by *sufficient evidence adduced at the trial* as part of its *prima facie* case. (1959 McKinney's Session Laws of New York, pp. 1625-1630.)

The reversal of the prior-conviction vacatur did not render Count 1 a nullity. It was not a nullity when the grand jury found it. The fact that the State in the interim tried this case without first making any effort to revive the previous conviction, nor to obtain any stay

of trial until it could realize its appeal to revive it, did not make the pleading defective or fatal to the jurisdiction of the trial court.

Petitioner's application for the vacatur was made in good faith. The court below seems to attach blame to him, stating that by making it *he* rendered it "impossible" to convict him. But it was the State through its court which decreed the vacatur, not petitioner. It is the simplest fairness that any error of the sovereign should not prejudice petitioner in these circumstances. (See: *Matter of Nolan, v. General Sessions,* 11 N. Y. 2d 114, 181 N. E. 2d 751.)

When petitioner was first put to trial by the State, in law he was placed in jeopardy as to Count 1 as a felony. The indictment at that time was valid on its face, the trial court had jurisdiction of the subject matter and of the person of petitioner, the indictment had been put in issue by his plea of not guilty, a jury had been sworn, and testimony and evidence was submitted upon the merits on all the issues presented by the indictment. Petitioner was then subjected to possibility of having a valid judgment pronounced against him as a result of the trial. (*Fong Foo v. United States,* 369 U. S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629; *People ex rel. Meyer v. Warden,* 269 N. Y. 426, 199 N. E. 647; *People v. Dillon,* 197 N. Y. 254, 90 N. E. 820; *People v. Colon,* 18 Misc. 2d 1061, 184 N. Y. S. 2d 537.)

The decision of the court below, unless reversed, would create an area of extreme departure from ordered personal liberty, inconsistent with the measure of fairness which the states owe to the citizens of the United States under the Fourteenth Amendment.

Any physical impossibility or improbability, although this did not exist here as is revealed by the ultimate

resuscitation of the prior conviction, that a conviction can result in a given case after trial does not prevent effective prior jeopardy from resulting so that an accused may successfully invoke his constitutional right not to be subjected successively to risk of conviction or punishment for the same crime. In other words, even where such impossibility or improbability appears after the trial starts, either on the facts or the law, it does not preclude the effective bar of former jeopardy from occurring. (*People ex rel. Meyer v. Warden*, 269 N. Y. 426, 199 N. E. 47; *People ex rel. Stabile v. Warden*, 202 N. Y. 138, 95 N. E. 7[illegible]; *Matter of Kraemer v. Suffolk County Court*, 6 N. Y. 2d 363, 160 N. E. 2d 633; *Matter of Nolan v. General Sessions*, 11 N. Y. 2d 114, 181 N. E. 2d 75[illegible]; *People v. Goldfarb*, 152 App. Div. 870, 138 N. Y. S. 62, aff'd 213 N. Y. 664; *Matter of Mack v. General Sessions*, 14 A. D. 2d 98, 217 N. Y. S. 2d 423; *People v. Gehlberd*, 272 App. Div. 914, 70 N. Y. S. 2d 819.)*

But, we do not have to reach this argument, because the State, with full knowledge that the prior conviction had been vacated, and without even attempting to obtain a stay of trial or a reversal of the vacatur, put petitioner to his trial well realizing that the trial court would be required by law to dismiss the felony charge of carnal abuse at the close of its evidence for failure of proof of the prior conviction. In fairness, the State could not contemplate a subsequent jury disagreement and successive trials for felony, depending on its diligence or lack of diligence, in dealing with the vacatur of the prior conviction.

---

* Pragmatically, the constitutional protection against double jeopardy is effectively realized by the remedy of prohibition. See, for example in New York: *Nolan*, *Kraemer* and *Mack*, cited in text, supra. And see: *Oliver v. Superior Court for Los Angeles County*, 92 Cal. A. 94, 267 Pac. 764; *State ex rel. Harger v. Chapman*, 131 Wash. 581, 230 Pac. 833. And see generally: *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094; *Ex parte Peru*, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014.

In this respect alone, the State should be estopped from objecting to the application of the former-jeopardy rule for the protection of petitioner.

Aside from this, it *was* in the realm of possibility and probability for the State to revive the prior conviction by accelerated conclusion of its appeal and by proper stay procedure before putting the petitioner to trial at all. Its neglect in these respects, all without the fault or consent of petitioner, should not be condoned by the courts to his prejudice.

When the State rested at the first trial, only the trial court, not the jury, could determine whether *insufficient evidence was adduced at the trial* to prove the charge of felony carnal abuse, i. e., whether the prior conviction alleged in the indictment had been proved. No such proof having been made, the trial court properly, as was its duty, dismissed the felony charge. This was the same as a not guilty verdict by a jury on that charge, and, therefore, constituted an acquittal of petitioner upon the charge of felony carnal abuse. (*Dunn v. United States*, 284 U. S. 390, 52 St. Ct. 189, 76 L. Ed. 356; *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199; *People v. Bennett*, 49 N. Y. 137; *Sullivan v. People*, 27 Hun 35; *People v. Dowling*, 84 N. Y. 478; *People v. Ledwon*, 153 N. Y. 10, 46 N. E. 1046; *People v. Sciascio*, 268 App. Div. 14, 48 N. Y. S. 2d 428, aff'd 294 N. Y. 927; N. Y. Code of Criminal Procedure, Secs. 341, 543, 544.)

In any case, the fact that a prosecutor is not prepared with his evidence at the trial, and even where he does not know this when he moves the trial, or where he seeks to hold his witnesses or evidence in abeyance, or because his treatment of the case is inept, does not afford him another go at the accused to the latter's suc-

cessive vexation. (*Brock v. North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456; *Downum v. United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100; *Kepner v. United States*, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114; *People v. Thrum*, 143 Misc. 7, 256 N. Y. S. 586.)

The rule in New York that, after reversal on appeal by an accused, he may be retried upon an indictment remaining unaffected by any dismissal by the trial court under the charges therein as to which the reversal was had, does not apply to retrial after a jury disagreement.

In such case, no one appeals; the accused cannot be deemed to have waived anything; and the disagreement cannot erase the previous proper judicial action dismissing a charge for insufficiency of evidence at the trial before anything was submitted to the jury. Nor does such dismissal subsequently followed by a jury disagreement on a lesser included charge present any legal exception to the bar of double jeopardy and estoppel. (See: *People v. Thrum*, 143 Misc. 7, 256 N. Y. S. 586.)

In New York, the dismissal of a charge by the trial court for insufficiency of evidence at the trial, even though erroneous on the law, is not appealable by the State, and is held to constitute an acquittal. (*People v. Reed*, 276 N. Y. 5, 11 N. E. 2d 330; *Matter of Kraemer v. Suffolk County Court*, 6 N. Y. 2d 363, 160 N. E. 2d 633; *People v. Marra*, 13 N. Y. 2d 18, 191 N. E. 2d 792; *People v. Goldfarb*, 152 App. Div. 870, 138 N. Y. S. 62, aff'd 213 N. Y. 664; *People v. Kassover*, 205 N. Y. S. 2d 428; *Matter of Allen v. City of Ithaca*, 33 Misc. 2d 356, 224 N. Y. S. 2d 1018.)

Successive trials for the same act after acquittal or conviction, or their equivalent, and double punishment for the same act are legally prohibited. (U. S. Con-

stitution, 14th Amend.; N. Y. Constitution, Art. I, Sec. 6; N. Y. Code of Criminal Procedure, Sec. 9; N. Y. Penal Law, Secs. 32 and 1938.)

In New York, a jury disagreement does not permit retrial as to any part of an indictment as to which an accused has been discharged at the trial. Sections 428 and 430 of the New York *Code of Criminal Procedure* are the only statutes governing. Section 428, subd. 2, provides that the jury may be discharged without verdict where they are unable to agree. (*People ex rel. Stabile v. Warden*, 202 N. Y. 138, 95 N. E. 729.) Section 430 permits retrial after jury disagreement "except where the defendant is discharged from the indictment, *during the progress of the trial*, * * *." (Italics ours.)

The re-trial wording in the *appeal* portions of the *Code*, Sec. 544, reads that when a new trial is ordered "it shall proceed in all respects as if no trial had been had." This, of course, is not true in the jury-disagreement situation.

In New York, where a re-trial is sought by the State, and not by the accused, in situations not specifically authorized by statute, the accused cannot again be lawfully tried on the same charge. And a statute which would authorize such a re-trial is unconstitutional. (*People ex rel. Blue v. Kearney*, 181 Misc. 981, 44 N. Y. S. 2d 691, aff'd 292 N. Y. 679; *Matter of Kraemer v. Suffolk County Court*, 6 N. Y. 2d 363, 160 N. E. 2d 633.)

A jury disagreement, cannot in said State give the prosecution something akin to a right of appeal from the dismissal by the trial court for a failure of proof adduced at the trial, when directly it can have no such right, as provided by the *Code of Criminal Procedure*, Sec. 518, subd. 3.

The State of New York, through the construction and application by the court below of the statutory and constitutional laws invoked by petitioner against double jeopardy, has deprived him of his rights to equal protection and due process of law under the Fourteenth Amendment to the *United States Constitution*. A constitutional misapplication of state statues by state courts is repugnant to the Fourteenth Amendment. (*Jackson v. Denno*, 378 U. S. 368 S. Ct. , L. Ed. 2d ; *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510.)

It is not due process for the State through its judicial branch of government to violate its own *Constitution*, Article I, Sec. 6, to ignore the guaranty that "no person shall be subject to be twice put in jeopardy for the same offense; * * *."

The State requirement of due process is repeated in Section 9 of the New York *Code of Criminal Procedure*: "No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted."

Section 1938 of the New York *Penal Law* "bars a prosecution for the same act or omission" which is punishable under different provisions of law after a conviction or acquittal under one provision.

The double-jeopardy prohibition in the *State Constitution* is substantially the same as in the Fifth Amendment to the *Federal Constitution*, the latter reading: "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *."

Likewise is this true in the *State Constitution*, Article I, Sec. 6, and the *Federal Constitution*, Fifth Amendment: "No person shall be deprived of life, liberty or property without due process of law."

It is respectfully submitted that the common law of due process and the composite of organic and statutory law discussed herein constitute the "law of the land," and that a violation by New York of any of these laws constitutes an infringement of due process of law repugnant to the Federal Fourteenth Amendment. (See: *People v. Laws*, 29 Ill. 2d 221, 193 N. E. 2d 806.)

It follows that New York is prohibited constitutionally from violating the laws protecting petitioner from double jeopardy and harassment by successive trial for the same offense under the circumstances here involved. (*Moore v. Illinois*, 55 U. S. [14 How.] 13, 14 L. Ed. 306; *Ex parte Ulrich*, 42 Fed. 587, rev'd o. g. 43 Fed. 661, followed in *People ex rel. Stabile v. Warden*, 67 Misc. 202, 122 N. Y. S. 284, and other New York decisions; *Brock v. North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456; *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 12 L. Ed. 2d 250; *Kepner v. U. S.*, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114, followed in *Matter of Nolan v. General Sessions*, 11 N. Y. 2d 114, 181 N. E. 2d 751, and other New York decisions.)

It is settled generally that re-trial upon the same charge after jury disagreement, pursuant to a State statute so providing, is not a deprivation of due process by reason of double jeopardy under the Fourteenth Amendment. (*Keerl v. Montana*, 213 U. S. 135, 29 S. Ct. 469, 53 L. Ed. 734.)

But this does not mean, of course, that such a disagreement *after the dismissal by the Court upon evidence adduced at the trial*, detracts from quality of such dismissal as an acquittal, and that the double-jeopardy defense is not available in that instance.

In any case, the question whether there has been a State violation of due process under the Fourteenth

Amendment is for the Federal Court for independent determination on the undisputed facts, and it will not be foreclosed by the conclusion of the State Court, and "due process" has like meaning under both the Fifth and Fourteenth Amendments. (*Malinski v. New York*, 324 U. S. 401, 415, 65 S. Ct. 781, 89 L. Ed. 1029; *Lovell v. City of Griffin*, 303 U. S. 444, 450, 58 S. Ct. 666, 82 L. Ed. 949.)

This applies to the defense of double jeopardy unconscionably permitted by a state, because it represents a deep underlying concept of fundamental fairness and justice in Anglo-American common law. (See: *Green v. United States*, 355 U. S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199; *Hebert v. Louisiana*, 272 U. S. 312, 317, 47 S. Ct. 103, 71 L. Ed. 270.)

It is included in the *New York Constitution*, Article I, Sec. 6. And it is part of the statutory and common law of New York.

The defense of double jeopardy must be construed under the *Bill of Rights* with reference to the common law from which it was taken, and is based upon the concept of fundamental fairness, inoffensive to the conscience, on the part of the sovereign. (*Kepner v. United States*, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114.)

Kepner, supra, is cited with approval in New York in: (*Matter of Nolan v. General Sessions*, 11 N. Y. 2d 114, 119, 181 N. E. 2d 751; *People v. Goldfarb*, 152 App. Div. 870, 874, 138 N. Y. S. 62, aff'd 213 N. Y. 664; *People ex rel. Cohen v. Collins*, 238 App. Div. 592, 595, 265 N. Y. S. 475; *People v. Thrum*, 143 Misc. 7, 9, 256 N. Y. S. 586).

In *Brock v. North Carolina*, 344 U. S. 424, 429, 73 S. Ct. 349, 97 L. Ed. 456, the trial was halted, on motion for a mistrial by the State, when two prosecution witnesses *unexpectedly* invoked their privilege against self-incrimi-

nation and declined to testify. Under the law of North Carolina, the trial court had the power to order the retrial which resulted in conviction. This court affirmed.

In the case at bar, however, the prosecutor moved for trial fully knowing of the likelihood that the charge of felony carnal abuse would be lawfully dismissed; and the said charge was dismissed before any case went to the jury.

Therefore, in this case the advertence of Mr. Justice Frankfurter in *Brock* renders the Fourteenth Amendment applicable in the protection of petitioner, to avoid an unacceptable example of harassment:

> "A State falls short of its obligation when it callously subjects an individual to successive re-trials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

It has been suggested that the meaning of the due process clause in the Fifth and Fourteenth Amendment is the same because they are of such a nature that they are included in the concept of governmental fairness binding on the states as the fundamental "law of the land." (See: *Twining v. New Jersey*, 211 U. S. 78, 99, 29 S. Ct. 14, 53 L. Ed. 97; *People ex rel. Stabile v. Warden*, 202 N. Y. 138, 95 N. E. 729.) Accumulated trials in themselves may violate organic law. (*United States ex rel. Marcus v. Hess*, 317 U. S. 537, 556, 63 S. Ct. 379, 87 L. Ed. 443.)

If the decision of the court below is correct, it would follow that its effect is to hold void or nullify the lawful judicial action of the trial court, in dismissing the charge of felony carnal abuse, on the ground that somehow the

dismissal was improper. But, even such a conclusion does not justify re-trial on the same charge. (*Ex parte Lange*, 85 U. S. [18 Wall.] 163; *Green v. United States*, 355 U. S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199; *People v. Reed*, 276 N. Y. 5, 11 N. E. 2d 330.)

The Federal Fifth Amendment concept of due process as forbidding double jeopardy is embodied in spirit and letter in the *Constitution* of New York, Article I, Sec. 6. It would seem then that the standard of fairness and of such due process developed in the Federal courts is applicable to New York, especially in view of the infiltration of pertinent Federal decisions in the judicial opinions of the State. (*People ex rel. Stabile v. Warden*, 202 N. Y. 138, 150, 95 N. E. 729.

In *Downum v. United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100, a case of the forgery of checks stolen from the mails, double jeopardy under the Fifth Amendment was involved. Both sides had announced their readiness for trial, selected a jury which was sworn, and then recessed. Upon resumption of court, the prosecutor moved for a discharge of the jury because of the absence of a key witness. The court ordered a mistrial over objection by the petitioner. Below he unsuccessfully pleaded double jeopardy in bar of his subsequent trial.

But this court reversed, holding that the constitutional defense should have been sustained by the trial court. The prosecution took a risk which should not have been held prejudicial to the accused.

Likewise, in the case at bar, the prosecutor, even though petitioner attempted against his opposition to prevent this, voluntarily proceeded with trial in the face of the probability of dismissal for failure to prove a necessary fact, the prior conviction, and thus to sustain a *prima facie* case of felony carnal abuse.

Cornero v. United States, 48 Fed. 2d 69, was cited by this court in *Downum*, supra. There the prosecutor drew the jury without first ascertaining whether his witnesses were available or not. This was held to be a situation simply where the prosecution entered upon the trial of a case *without sufficient evidence* to convict, and, therefore, the defense of double jeopardy was not precluded. It was pointed out that such constitutional protection must be applied in favor of the liberty of the Citizen. (Semble: *Sapir v. United States*, 348 U. S. 373, 75 S. Ct. 422, 99 L. Ed. 426; *United States ex rel. Rush v. Watson*, 28 Fed. Cas. 499, Case No. 16,651.)

No real distinction can be made between the unavailability of testimonial evidence and any other kind of necessary evidence, such as evidence of a prior conviction, which is a required element of the charge, and which must be proved like any other such element.

Assume a case of mistaken identity as to the person previously convicted, or inability to prove the identity, and, therefore, a failure of proof as to the particular accused of any prior conviction, resulting in dismissal by the trial court. Such dismissal by the court would have the same effect as a jury verdict of not guilty. Would any subsequent replenishment of evidence in such respect permit lawfully a re-trial of the accused on the charge dismissed or on the same charge revived? We submit not. (*Sapir v. United States*, 348 U. S. 373, 75 S. Ct. 422, 99 L. Ed. 426.)

In *Sapir*, supra, at 348 U. S. 374, the Court said:

> "But an acquittal on the basis of lack of evidence concludes the controversy * * *, and puts it at rest under the protection of the Double Jeopardy clause, absent a motion by the defendant for a new trial."

Where an essential element of a criminal charge is not proved, an acquittal regardless of form must follow. *Forman v. United States,* 264 Fed. 2d 955, aff'd 361 U. S. 416, 80 S. Ct. 481, 4 L. Ed. 2d 412; *People v. Goldfarb,* 152 App. Div. 870, 138 N. Y. S. 62, aff'd 213 N. Y. 664; *Matter of Kraemer v. Suffolk County Court,* 6 N. Y. 2d 363, 160 N. E. 2d 633.)

New York must follow valid constitutional criteria in its administration of criminal law in conformity with the Fourteenth Amendment. It adopted these criteria in its own *Constitution.* But its refusal to afford double-jeopardy protection to petitioner in the instant case violates these standards, and would not lead "to a liberal rather than a niggardly interpretation" of personal liberty. See: *Rogers v. Richmond,* 365 U. S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760; *Mapp v. Ohio,* 367 U. S. 643, 666, 81 S. Ct. 1684, 6 L. Ed. 2d 1081; *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792, 12 L. Ed. 2d 250; *Jackson v. Denno,* 378 U. S. 368, S. Ct. , L. Ed. 2d ; *Escobedo v. Illinois,* 378 U. S. 478, S. Ct. , L. Ed. 2d ; *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422.)

We respectfully submit that the citizen's right against double jeopardy is as fundamental as his rights inviolable by the states, e. g., to protection from unreasonable search and seizure, from a no-counsel defense, from a coerced confession, or from an unfairly proved confession, and that it is a freedom "implict in the concept of ordered liberty," and should, therefore, be afforded to petitioner here under the Fourteenth Amendment. (*Moore v. Illinois,* 55 U. S. [14 How.] 13, 14 L. Ed. 306; *Ex parte Ulrich,* 42 Fed. 587, rev'd o. g. 43 Fed. 661.)

The Illinois *Constitution* contains a prohibition against double jeopardy similar to that provided by the Federal Fifth Amendment and by the *Constitution* of New York,

Article I, Sec. 6, and other states. In this context, the Supreme Court of Illinois upholding a plea of double jeopardy, said:

> "The fifth amendment to the United States Constitution, the commands of which are made binding on the States by the due process clause of the Fourteenth Amendment, makes substantially the same provisions."

(*People v. Laws,* 29 Ill. 2d 221, 193 N. E. 2d 806; see: *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Moore v. Illinois,* 55 U. S. [14 How.] 13, 14 L. Ed. 306; *Ex parte Ulrich,* 42 Fed. 587, rev'd o. g. 43 Fed. 661; *In re Bennett,* 84 Fed. 324.)

Ulrich, supra, was judicially cited in New York with approval. (*People ex rel. Stabile v. Warden,* 67 Misc. 202, 122 N. Y. S. 284; *People ex rel. Brinkman v. Barr,* 129 Misc. 701, 222 N. Y. S. 490; *People ex rel. Totalis v. Craver,* 174 Misc. 324, 20 N. Y. S. 2d 533; *People ex rel. Pulko v. Murphy,* 244 App. Div. 382, 280 N. Y. S. 405; *People v. Hines,* 12 N. Y. S. 2d 454.)

Where a state statute does permit an appeal by the State from a criminal judgment *based upon error* at the trial, this court has held that no unlawful double jeopardy ensues upon a re-trial of an accused. (*Palko v. Connecticut,* 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288.)

But New York forbids an appeal by the State from a criminal judgment, *even one not free from legal error,* where it is rendered upon the evidence adduced at the trial. (N. Y. Code of Criminal Procedure, Sec. 518, subd. 3; *Matter of Kraemer v. Suffolk County Court,* 6 N. Y. 2d 363, 160 N. E. 2d 633.) Therefore, the Fourteenth Amendment reaches the situation in the instant case, there being no contrary exception under New York law.

Shoener v. Pennsylvania, 207 U. S. 188, 28 S. Ct. 110, 52 L. Ed. 163, is no authority for denying double-

jeopardy defense to the petitioner here. This court in that case merely held, we respectfully submit, that a person tried under an indictment so radically defective on its face that a conviction could not be supported by it, is not put in jeopardy thereby. The Special Term here, in citing that decision went beyond its holding (38 Misc. 2d 109, 238 N. Y. S. 2d 110). This was clarified by Mr. Justice Harlan, discussing *Shoener,* in his dissenting opinion in *Twining v. New Jersey,* 211 U. S. 78, at 116-117, 29 S. Ct. 114, 53 L. Ed. 97.

And, as if anticipating the question presented in this New York case, Mr. Justice Cardozo in *Palko* (at 302 U. S. 328) wrote:

> "What the answer would have to be if the state were permitted after a trial *free from error* to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other." (Italics ours.)

(See: *United States ex rel. Marcus v. Hess,* 317 U. S. 537 at 556, 63 S. Ct. 379, 87 L. Ed. 443.)

The Fourteenth Amendment embraces all those fundamental principles of liberty and justice which lie at the base of our civil and political institutions, even though they are specifically dealt with in another part of the *United States Constitution.* This court looks to the fundamental nature of a question under the original *Bill of Rights* in deciding whether the Fourteenth Amendment makes them obligatory upon the states. The defense of double jeopardly should be no exception.

Immunities that are valid against the Federal Government under particular provisions of the *Bill of Rights* are implicit in the concept of ordered liberty, and, therefore through the Fourteenth Amendment they are valid as against the states, and those guarantees which were

originally applicable against the Federal Government alone have been brought within the Fourteenth Amendment by a process of absorption. There would seem to be no reason, considering the case at bar, why New York should not be prevented now from putting the petitioner again to trial on the charge of felony carnal abuse of which he was acquitted by the trial court. (*Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 12 L. Ed. 2d 250.)

CONCLUSION.

The writ of certiorari petitioned for herein should be granted.

November 25, 1964.

Respectfully submitted,

FRANK E. VISCO,
Attorney for Petitioner.

Certificate.

I hereby affirm that I am a counsellor-at-law of the State of New York and duly admitted to the Supreme Court of the United States, and that this application for a Writ of Certiorari is made in good faith and not for the purpose of delay.

FRANK E. VISCO.

Opinion of Court Below.

1 1

In the Matter

of

Alfred Bishop,

Respondent,

v.

Supreme Court of the State of New York, *et al.*,

Appellants.

Decided July 10, 1964.

Per Curiam:

Since the respondent Bishop was never placed in jeopardy of conviction for the crime of carnal abuse as a felony, subjecting him to trial for such offense will not constitute double jeopardy. When the respondent sought and obtained an order vacating the 1937 judgment of conviction—on the strength of which he was charged in the 1960 indictment with the felony of carnal abuse—any and all danger of his being convicted of such crime upon the trial of that indictment was eliminated. In other words, by procuring the vacatur of the earlier judgment, the respondent rendered his conviction of the felony impossible as a matter of law and, consequently, the trial judge's dismissal of the felony charge at the close of the People's case, rather than constituting a dismissal of that charge on the merits, simply reflected and confirmed the then existing situation. When, therefore, the order vacating the 1937 judgment was reversed on appeal (*People v. Bishop*, 14 A. D. 2d 376, affd. 11 N. Y. 2d 854) and that conviction was reinstated, the People were (and are) free to proceed against the respondent—

after the trials on the 1960 indictment had terminated in disagreement and mistrials—upon a superseding indictment charging the respondent with carnal abuse as a felony.

The order appealed from should be reversed and the petition dismissed.

Chief Judge Desmond and Judges Dye, Fuld, VanVoorhis, Burke and Scileppi concur; Judge Bergan taking no part.

Order reversed, etc.

Order Denying Re-argument and Granting amendment of Remittitur.

IN

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the First day of October A. D. 1964.

Present:

Hon. Charles S. Desmond, Chief Judge, presiding.

3 Mo. No. 652

In the Matter

of

The Application of Alfred Bishop,

Petitioner-Respondent,

vs.

The Supreme Court of the State of New York, The Honorable Daniel J. McAvoy, as Justice of said Court, and Richard B. Thaler, Esq., as District Attorney of the County of Tompkins, pursuant to Article 78 of the Civil Practice Act,

Appellants.

A motion for a re-argument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the petitioner-respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks re-argument, be and the same hereby is denied: and it is

Ordered, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted; the return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

The petitioner contended that the order directing his retrial upon the charge of carnal abuse as a felony would deny him due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. The Court of Appeals, passing upon such contention, held that there was no violation of the petitioner's constitutional rights.

And the Appellate Division of the Supreme Court, Third Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

GEARON KIMBALL
Deputy Clerk

(Seal)

Amended Remittitur.

COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 10th day of July in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.

Remittitur July 10, 1964

3 No. 210

IN THE MATTER

of

The Application of ALFRED BISHOP,

Respondent,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, & ORS., &c.,

Appellants.

BE IT REMEMBERED, That on the 21st day of May in the year of our Lord one thousand nine hundred and sixty-four, The Supreme Court of the State of New York, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Richard B. Thaler, District Attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Alfred Bishop, the respondent—in said cause, afterwards appeared in said Court of Appeals by John LoPinto, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard B. Thaler, of counsel for the appellants, and by Mr. John LoPinto, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from

herein be and the same hereby is reversed and the petition dismissed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: The petitioner contended that the order directing his retrial upon the charge of carnal abuse as a felony would deny him due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. The Court of Appeals, passing upon such contention, held that there was no violation of the petitioner's constitutional rights.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS.

CLERK'S OFFICE,

Albany, July 10, 1964.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

Provisions of New York State Constitution.

McKinney's Consolidated Laws of New York, New York Sate Constitution, Article I, Section 6:

Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for

the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer, who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. As amended and approved November 3, 1959, eff. Jan. 1, 1960.